STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

JOEL EUSEVIO DAVIS

Defendant-Appellant.
_____/

Supreme Court No. _____
(prior MSC No. 156406)

Court of Appeals No. 332081

Circuit Court No. 15-5481-01

WAYNE COUNTY PROSECUTOR
BY: AMANDA MORRIS SMITH (P73127)
Attorneys for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorneys for Defendant-Appellant
_____/

DEFENDANT-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

(AFTER REMAND)

STATE APPELLATE DEFENDER OFFICE

BY: JACQUELINE J. McCANN (P58774)
MICHAEL L. MITTLESTAT (P68478)
MAYA MENLO (P82778)
Attorneys for Defendant-Appellant
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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Statement of Jurisdiction/ Judgment Appealed from and Relief Sought

Defendant-Appellant Joel Davis was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on March 9, 2016. A Claim of Appeal was filed on March 21, 2016 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated March 14, 2016, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). The Court of Appeals reversed in a published opinion. This Court granted oral argument on the prosecutor's application for leave to appeal, partially vacated the Court of Appeals' opinion and remanded for additional consideration. *People v Davis*, 320 Mich App 484, 489-497 (2017), vacated in part by 503 Mich 984 (2019). On remand, the Court of Appeals affirmed the convictions in a 2-1 decision. *People v Davis (On Remand)*, unpublished per curiam opinion of the Court of Appeals, No. 332081, dated November 12, 2019, attached as Appendix B. This Honorable Court now has jurisdiction. MCR 7.303(B). This Court should grant leave to appeal or take other appropriate action as the issues involve legal principles of major significance to the state's jurisprudence, and where the Court of Appeals' decision is clearly erroneous and will cause material injustice to Mr. Davis. MCR 7.305(B).

Statement of Questions Presented

I. Do MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct? Do Defendant's convictions for both thus violate the state and federal constitutional prohibitions on double jeopardy? Does *People v Doss* allow this Court to grant relief?

Court of Appeals answers, "No."

Joel Eusevio Davis answers, "Yes."

II. Was Mr. Davis denied his state and federal constitutional rights to a jury trial where the court removed the issue of which mens rea the defendant possessed from the jury's consideration?

Court of Appeals made no answer.

Joel Eusevio Davis answers, "Yes."

III. Were Mr. Davis's state and federal rights to Due Process violated by the prosecution's use of conflicting and mutually exclusive theories and the trial court's entry of conflicting and mutually exclusive judgments?

Court of Appeals made no answer.

Joel Eusevio Davis answers, "Yes."

Statement of Facts

Appellate Background

This case returns to this Honorable Court following remand to the Court of Appeals. In his first direct appeal, Joel Davis raised a claim that his convictions for both Aggravated Domestic Assault and Assault with Intent to Commit Great Bodily Harm (AWIGBH) constituted a Double Jeopardy violation, as the two offenses have conflicting and mutually exclusive intent requirements. The Court of Appeals found that Double Jeopardy was the wrong initial focus, and instead vacated the Aggravated Domestic Assault conviction as being an improperly entered mutually exclusive verdict. *People v Davis*, 320 Mich App 484, 489-497 (2017), vacated in part by 503 Mich 984 (2019). After hearing oral argument, this Court vacated that portion of the Court of Appeals' opinion and remanded for it to decide the Double Jeopardy claim, stating in part:

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> Regardless of whether this state's jurisprudence recognizes the principle of mutually exclusive verdicts, this case does not present that issue. In this case, the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted "with intent to do great bodily harm, less than the crime of murder." See MCL 750.84(1)(a). However, with respect to Aggravated Domestic Assault , the jury was not instructed that it must find that defendant acted without the intent to inflict great bodily harm. See MCL 750.81a(3); *People v Doss*, 406 Mich 90, 99 (1979) ("While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."). Since, with respect to the Aggravated Domestic Assault conviction, the jury

> never found that defendant acted without the intent to inflict great bodily harm, a guilty verdict for that offense was not mutually exclusive to defendant's guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm. Thus, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate defendant's Aggravated Domestic Assault conviction. We thus VACATE that part of the Court of Appeals judgment relevant to that finding.
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> ***
>
> Accordingly, we REMAND this case to the Court of Appeals for reconsideration of the parties' arguments in light of *People v Miller*, 498 Mich 13 (2015). We also direct the Court of Appeals to determine and apply the appropriate standard of review to this double-jeopardy challenge because the applicable standard of review was not explicitly addressed by the Court of Appeals in its July 13, 2017 judgment. (Footnotes omitted.)

This Court did not retain jurisdiction. *Id.*

On remand, in a 2-1 decision, the Court of Appeals majority held that convictions for the two offenses with their conflicting mens rea requirements did not violate Double Jeopardy under *People v Miller* because of subsection 3 in the AWIGBH statute, MCL 750.84, which provides: "This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." *People v Davis (On Remand)*, unpublished per curiam opinion of the Court of Appeals, No. 332081, dated November 12, 2019, attached as Appendix B, p 4. The Court of Appeals' majority also looked to the legislative history of the two statutes. *Id.* at 4-7.

The Honorable Douglas B. Shapiro dissented, and explained that the entry of mutually exclusive judgments violates Due Process and should not be allowed to stand:

> In my view, our prior opinion erred by defining the problem as one of mutually exclusive verdicts instead of a mutually exclusive judgments. The Supreme Court reversed because verdicts cannot be mutually exclusive when the jury is not instructed on the element that creates the inconsistency. I respectfully suggest, however, that while whether or not a jury is instructed on a negative element is relevant to a claim of mutually exclusive verdicts, it is irrelevant to the question whether the court violates a defendant's due process rights by entering a judgment for two crimes that by their terms cannot exist simultaneously. The jury is not aware that the crimes are by their plain language mutually exclusive, but the court is and, in my view, must therefore decline to enter a judgment of conviction for both offenses.
>
> ***
>
> The majority notes that MCL 750.84(3) provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." I agree; a conviction for AWIGBH does not immunize a defendant against convictions of other crimes arising out of the assault. However, the question is not whether as a general matter a defendant may be convicted of other crimes arising out of the assault, but whether the judicial system may adjudge a defendant guilty of two crimes when the statutes defining them make clear that factually only one can exist at a time, i.e., either a defendant has the intent to do great bodily harm or not.
> (COA opinion on remand, Appendix B, dissent pp 1-2).

Factual Background/Trial Proceedings

Joel Davis was convicted of Aggravated Domestic Assault as a second offender, and Assault with Intent to Do Great Bodily Harm Less than Murder (AWIGBH) following a two-day jury trial before Wayne County Circuit Court Judge Thomas Cameron on February 16-17, 2016. The charges arose out of an incident occurring during the early morning hours of June 10, 2015, at the Dearborn Heights house

where the complainant, Shanna Shelton, lived with Mr. Davis, her boyfriend of seven months.

Ms. Shelton and Mr. Davis had been drinking and using cocaine together at the house and eventually Shelton fell asleep. T1 168-170, 179-180. According to Ms. Shelton, she was asleep with the lights on in the same room as Mr. Davis when, around 4 a.m., he woke her up to ask where she had put the ashtray. *Id.* at 150-151. Irritated that she'd been awoken, Ms. Shelton responded that she did not know, "with an attitude." T1 149-150.

In response, Ms. Shelton claimed, Mr. Davis started yelling at her and dragged her from the bed to the floor by her shirt collar. T1 151-152. When Ms. Shelton responded with an expletive, Mr. Davis allegedly struck her two or three times in the head and face with his hand. *Id.* at 152-153, 189. Ms. Shelton got up and ran into the into the living room, where Mr. Davis caught up with her and struck her two or three times in the face and head, eventually knocking her to the floor and bloodying her nose. *Id.* at 153-154, 189-190.

Ms. Shelton testified that Mr. Davis continued hitting her and telling her to "shut up" each time she implored him to stop. When Mr. Davis said, "you're going to make me have to kill you," Ms. Shelton stopped talking and Mr. Davis ceased striking her. T1 154-155, 191-192, 200. She then got up and ran to the bathroom, where she rinsed the blood from her nose and split lip. *Id.* at 155. She looked in the mirror and noticed both her eyes appeared to be swollen almost shut. *Id.*

After a few moments, Ms. Shelton returned to the living room and noticed Mr. Davis had left, so she started searching for her mobile phone to call 911. T1 156-157. She could not find her phone or her purse, which had about $400 cash in it, and claimed Mr. Davis must have taken them when he left. *Id.* She then looked outside to see that her 2001 Jeep Cherokee was gone as well. *Id.* at 157.

Ms. Shelton was later changing her clothes when she heard a car pull into her driveway and saw Mr. Davis entering the house. Before he entered the house, Ms. Shelton ran out the back door to a neighbor's house, where she called 911 and waited for the police to arrive. T1 158-160.

Responding officers photographed Ms. Shelton's face, after which they returned with her to her and Mr. Davis' house to find her Jeep was again gone. T1 160, 204. With Ms. Shelton's permission, officers broke into the house and searched for her purse and phone, to no avail. *Id.* at 160, 206-207.

Although Ms. Shelton refused ambulance transportation to the hospital from her house, T1 207, she later went to the emergency room with her mother. T1 165-172. There, she was treated for pain, x-rayed and scanned, and given a neck collar to wear. T1 165-172. She was released after about five hours, given pain medication, and told to wear the neck brace for two weeks. *Id.* at 168-169, 192-193, 196-197.

The next day, Ms. Shelton learned that her Jeep was back at her house, so she returned to the scene with police officers. T1 172-173, 194. After their knocks went unanswered, officers forced their way into the house, where they found Ms. Shelton's phone beneath the bed but could not find her purse. *Id.* at 183-194.

At trial, evidence was presented, including photographs, indicating that Ms. Shelton had both her eyes swollen nearly shut, a broken lip, and a bruised nose shortly after she was contacted by police. T1 204-205; PX 10-14. Ms. Shelton claimed that after the incident, she began suffering seizures and had to be medicated for it. T1 170. But while medical records admitted at trial outlined the treatment and diagnosis of her injuries, those records failed to reveal anything about a seizure disorder, or any link between the alleged injuries she suffered on June 10, 2016, and any seizure disorder. PX 15.

At the close of the evidence, the prosecutor asked the jury to convict Mr. Davis of Aggravated Domestic Violence, Assault with Intent to Do Great Bodily Harm Less than Murder (AWIGBH), Unlawfully Driving Away of Ms. Shelton's Automobile (UDAA), and Larceny of Property Valued at Between $200 and $2,000. Verdict Form; T2 96-103.

Upon deliberation, the jury returned verdicts finding Mr. Davis guilty of Aggravated Domestic Violence and AWIGBH, but not guilty of the UDAA and Larceny counts. Verdict Form; T2 121-123.

On March 9, 2015, the trial court departed above the calculated advisory guideline range of 29-57 months and imposed a sentence of 65 to 120 months in prison for the AWIGBH count, concurrent with a 12 to 60-month sentence on the Aggravated Domestic Assault count. ST 20-23.

Arguments

I. MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct. Defendant's convictions for both thus violate the state and federal constitutional prohibitions on double jeopardy. *People v Doss* does not preclude this Court from granting relief.

Standard of Review/Issue Preservation

An appellate court reviews questions of law regarding statutory construction and the application of the state and federal constitutions de novo. *People v Miller*, 498 Mich 13, 17-18 (2015); *People v Herron*, 464 Mich 593, 599 (2001).

Discussion

A. The legislative intent against multiple punishments is demonstrated by the plain language of the statutes.

The United States and the Michigan Constitutions provide that no person may be put in jeopardy twice for the same offense. US Const, Ams V,[1] XIV[2]; Const 1963, art 1, § 15.[3] Double jeopardy is composed of a successive prosecution strand and a multiple punishment strand. See *North Carolina v Pearce*, 395 US 711 (1969); *Miller,*

[1] US Const, Am V, provides in pertinent part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...."

[2] The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Ream*, 481 Mich 223, 255 (2008); *Benton v Maryland*, 395 US 784, 795-796 (1969).

[3] Const 1963, art 1, § 15 provides in pertinent part that "[n]o person shall be subject for the same offense to be twice put in jeopardy."

supra at 17. This case involves the multiple punishments strand. See *Miller, supra* at 17.

As this Court explained in *Miller, supra* at 17-18:

> The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." The multiple punishments strand is not violated "[w]here 'a legislature specifically authorizes cumulative punishment under two statutes....'" Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." (Footnotes omitted.)

The Legislature's intent that a person not be convicted and sentenced for both Aggravated Domestic Assault, MCL 750.81a(2), and AWIGBH, MCL 750.84, for the same acts committed against the same victim is shown by the plain language of the statutes. The statutes contain contradictory and mutually exclusive *mens rea* provisions.

Aggravated Domestic Assault is statutorily defined in relevant part as an assault causing aggravated injury by a person who acts "*without intending to commit murder or to inflict great bodily harm less than murder*." MCL 750.81a(2)[4] (emphasis added). The AWIGBH statute of course requires proof that the defendant acted with "*intent to do great bodily harm, less than the crime of murder*." MCL 750.84 (emphasis added).

The language in MCL 750.84(3) that allows for conviction and punishment for "any other violation of law arising out of the same conduct as the violation of this section," does not compel a different result. While this phrasing would appear broad, reliance on it falls apart when considered along-side the clear language of MCL 750.81a(1) and (2), that excludes acts committed with the intent to do great bodily harm or with intent to kill from conviction for Aggravated Domestic Assault. In enacting statutes with such diametrically opposed *mens rea* requirements, the Legislature spoke with clarity and the otherwise broad language of MCL 750.84(3) does not support allowing convictions and punishments for offenses involving diametrically opposed *mens rea*s.

[4] In full, MCL 750.81a(2) provides that "[e]xcept as provided in subsection (3), an individual who assaults his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL: 750.81a(3) elevates the offense to a felony punishable by up to five years in prison if the defendant had one or more prior convictions under subsection (2); MCL 750.81 – 750.84 or 750.86; or a law of another state or political subdivision of another state substantially corresponding to the same.

This Court has explained that when statutory language is clear, it must be followed:

> When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." "When a statute's language is unambiguous, ... the statute must be enforced as written. No further judicial construction is required or permitted." *People v Pinkney*, 501 Mich 259, 268 (2018).

In *Miller*, at 25, this Court wrote of "our well-recognized rule that we 'must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" (citation omitted). This Court "will not interpret a statute in such a manner as to treat any word as nugatory or mere surplusage." *People v Carter*, 503 Mich 221, 229 n 29 (2019). Where statutes use different language, attention must be paid to the difference and this Court will not construe one or both so as to render any part of one of the statutes as nugatory or surplusage. *People v McGraw*, 484 Mich 120, 126 (2009)(comparing the statutory language of OV 9 to other the statutory language for other offense variables to reject a transactional approach to OV 9).

The Court of Appeals' majority instead read the language "without intending to commit murder or to inflict great bodily great bodily harm less than murder" out of the Aggravated Domestic Assault statute, and rendered it mere surplusage or nugatory in contravention of this Court's well established rules for statutory construction. Because in the plain language used the Legislature did not provide for

multiple punishments between these two statutes, allowing both convictions to stand violates the state and federal constitutional prohibitions on double jeopardy.

To read the words "without intending to commit murder or to inflict great bodily harm less than murder" out of the Aggravated Domestic Assault statute, the Court of Appeals' majority largely looked to legislative history behind the amendments to the statutes. *People v Davis (On Remand)*, unpublished per curiam opinion of the Court of Appeals, No. 332081, dated November 12, 2019, attached as Appendix B, p 4-7. But in his dissent Judge Shapiro noted: "*The majority undertakes a thoughtful analysis of legislative intent reviewing the interplay of various amendments. However, none of the amendments speaks to the specific contradictory language in the offenses before us*." Appendix B, dissent p 2, n 1 (emphasis added). Further, this Court has explained that this sort of judicial construction is not permitted where the statutory language is clear or if two provisions can instead be construed to avoid conflict. *People v Hall*, 499 Mich 446, 453-454 (2016); *People v Webb*, 458 Mich 265, 274 (1998).

Related statutes are in *pari materia* and must be read together in harmony. In *Webb, supra* at 274, this Court explained:

> In addition, when this Court construes two statutes that arguably relate to the same subject or share a common purpose, the statutes are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. Feld v. Robert & Charles Beauty Salon, 435 Mich. 352, 359–360, 459 N.W.2d 279 (1990); Crawford Co. v. Sec'y of State, 160 Mich.App. 88, 408 N.W.2d 112 (1987). The object of the in pari materia rule is to give effect to the legislative purpose as found in harmonious statutes. Jennings v. Southwood,

> 446 Mich. 125, 136–137, 521 N.W.2d 230 (1994). If statutes lend themselves to a construction that avoids conflict, then that construction should control. House Speaker v. State Administrative Bd., 441 Mich. 547, 568–569, 495 N.W.2d 539 (1993).

Here, MCL 750.84(3) allows for conviction and punishment for AWIGBH under subsection (1)(a) along with "any other violation of law arising out of the same conduct as the violation of this section," except where by its provisions another law, i.e. MCL 750.81a (Aggravated Domestic Violence), requires that the defendant acted "without intending to commit murder or to inflict great bodily harm less than murder." MCL 750.84(3) must yield to Double Jeopardy protections in the case of AWIGBH and Aggravated Domestic Assault due to the conflicting *mens rea* requirements. But if, for example, a defendant were charged under MCL 750.84(1)(b) with Assault by Strangulation or Suffocation, which by its terms does not require intent to commit great bodily harm, then MCL 750.84(3) would allow a simultaneous conviction for Aggravated Domestic Violence based on the same conduct that forms the basis for conviction under MCL 750.84(1)(b).

Significantly, the Michigan Legislature modified both MCL 750.81a and MCL 750.84 in April 2013. At that time, the Legislature added MCL 750.84(3), but declined to add the same or similar language to MCL 750.81a. This inaction, especially given that the Legislature revisited both statutes in tandem, is further evidence that the Legislature did not intend for a criminal defendant to be punished for both Aggravated Domestic Assault and AWIGBH arising out of the same conduct.

As demonstrated above by the plain language of the statutes at issue, the Legislature did not intend multiple punishments for Aggravated Domestic Assault and AWIGBH. Because the Legislature did not intend for a criminal defendant to be punished for these two offenses—which feature contradictory and mutually exclusive *mens rea* provisions—for the same acts against the same victim, Mr. Davis' convictions and sentences violate the state and federal prohibitions against Double Jeopardy. This Court must dismiss and vacate his Aggravated Domestic Assault conviction, the less serious conviction, and order resentencing on the remaining count.[5] *Miller,* 498 Mich at 26-27.

B. ***People v Doss*** **does not compel a different result.**

In *People v Doss*, 406 Mich 90 (1979), the Supreme Court did not address a Double Jeopardy question, as the defendant was charged with a single count of statutory manslaughter, MCL 750.329. In *Doss*, the Supreme Court addressed the analytically distinct question of whether the statutory language "without malice" was an element of the offense that the People must prove. The Court of Appeals held that the Information should have been quashed because the People had failed to establish an essential element of the statutory offense, i.e. that the defendant acted "without malice". *Id.* at 96-98. The Supreme Court noted that "it is manifestly impossible for

[5] The defendant received two sentences instead of one. But, perhaps more importantly where concurrent sentencing is involved, for each individual sentence the defendant stands before the court as someone having been convicted of multiple offenses which can cause the court to increase the sentence impose. It also impacts the defendant's sentencing guidelines range via the scoring of Prior Record Variable 7 for a concurrent conviction, e.g. raising even a first-time offender's prior record level from A to at least C. MCL 777.57 (PRV 7); MCL 777.61 -777.69 (sentencing grids). This can significantly increase the sentencing guidelines range. *Id.*

an act to be at the same time malicious and free from malice" (*Id.* at 98) and that "'[m]alice' or 'malice aforethought' is that quality which distinguishes murder from manslaughter." (*Id.* at 99). However, the Supreme Court held that the prosecutor is not required to prove an absence of malice, which it described as absence of an element, explaining that crimes do not have negative elements that must be proven. *Id.* at 99.

Doss did not answer the question of whether it would violate double jeopardy principles for a defendant to be convicted of murder and statutory manslaughter. Application of *Miller* answers that question in the affirmative, just as application of *Miller* here answers that convictions for both AWIGBH, MCL 750.84(1)(a), and Aggravated Domestic Assault , MCL 750.81a, constitutes a double jeopardy violation.

II. Mr. Davis was denied his state and federal constitutional rights to a jury trial where the court removed the issue of which mens rea the defendant possessed from the jury's consideration.

Standard of Review/Issue Preservation

This Court may "permit the reasons or grounds for appeal to be amended or for new grounds to be added" at any time. MCR 7.316(A)(3). The Court of Appeals' resolution of Mr. Davis' case on grounds other than Double Jeopardy creates additional questions. Namely, if Mr. Davis' convictions for Aggravated Domestic Assault and AWIGBH do not violate Double Jeopardy, this Court must revisit and restructure its rule in *People v Doss*.

This Court reviews questions of law, including the constitutional right to a jury trial, de novo. *People v Miller*, 498 Mich 13, 17-18 (2015); *People v Herron*, 464 Mich 593, 599 (2001); *see Anzaldua v Band*, 457 Mich 530, 533 (1998).

Discussion

Mr. Davis was entitled to, and requested, a jury trial. US Const VI, XIV; Const 1963, art 1, § 20.[6] It is violative of a defendant's state and federal right to a jury trial to remove from the jury's consideration an essential question of fact: which *mens rea* the defendant possessed at the time of the alleged criminal act. Applying *Doss* outside of its context, and after this Court has changed this State's law on Double Jeopardy, and cognate lesser included offenses allows a situation in which a jury is liable to unwittingly convict a defendant of two offenses that are contradictory and mutually

[6] The Sixth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Parker v. Gladden*, 385 U.S. 363 (1966).

exclusive. When two counts have diametrically opposed intent requirements, as here, a defendant's Sixth Amendment rights demand an instruction on the *mens rea* of each offense.

Furthermore, it is unfair to jurors themselves, who would likely decline to convict a defendant of contradictory offenses if the court were transparent about the inconsistency. Jurors should not be duped into rendering contradictory and mutually exclusive verdicts. Instead, they should receive clear and accurate instructions on how to resolve questions of fact, such as whether a criminal defendant intended to cause great bodily harm.

By charging Mr. Davis with both Aggravated Domestic Assault and AWIGBH, the People placed the issue of intent squarely before the jury. The prosecutor argued in closing that the intent element "is gonna be the most important." T2 66. Likewise, the issue of intent was critical to defense counsel's argument that the People had not met their burden as to the AWIGBH count. T2 82, 88-89. In rebuttal, the prosecutor again focused on the defendant's intent. T2 96.

The jury alone must resolve questions of fact. *See People v. Thorpe*, 504 Mich. 230, 254 (2019). The question of fact of which *mens rea* the defendant possessed at the time of the alleged criminal act was improperly removed from the jury's consideration. As this Court pointed out in its March 22, 2019 order in Mr. Davis' case, "…with respect to aggravated domestic assault, the jury was *not* instructed that it must find that defendant acted *without* the intent to inflict great bodily harm." *People v Davis*, 503 Mich 984 (2019) (*Davis II*). Given the undeniable conflict between

the *mens rea* requirements for Aggravated Domestic Assault and AWIGBH, it is a violation of a defendant's right to a jury trial to remove the question of intent from the jury.

Even if this Honorable Court determines that Double Jeopardy does not preclude convicting a criminal defendant of both Aggravated Domestic Assault and AWIGBH, the question of which *mens rea* the defendant possessed cannot be taken from the jury when the charged offenses contain conflicting and mutually exclusive *mens rea* requirements. The Court in *People v Doss* held that "[w]hile the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which State must establish beyond a reasonable doubt." 406 Mich 90, 99 (1979).

Doss was decided in a legal universe where cognate lesser offenses were presented to the jury clearly as alternatives to the greater charge. If the jury still somehow convicted the defendant of both the lesser and greater offense, the trial court would have vacated the lesser conviction under the then-applicable 'same transaction test' for Double Jeopardy. *See People v Cornell*, 466 Mich 335 (2002); *see People v Nutt*, 469 Mich 565 (2004).

These two concepts no longer exist. *Id.* As in this case, the only reason the jury would be instructed on the cognate lesser offense of Aggravated Domestic Assault was because the prosecutor charged that count. But because of *Cornell*, Aggravated Domestic Assault is presented as an additional count rather than as an alternative lesser included offense. If the jury convicts the defendant of both the

greater and lesser counts, and if the Court of Appeals' decision in this case stands, the lesser offense will no longer be vacated as a Double Jeopardy violation. As a result, the defendant will face greater punishment. The defendant received two sentences instead of one. But, perhaps more importantly where concurrent sentencing is involved, for each individual sentence the defendant stands before the court as someone having been convicted of multiple offenses which can cause the court to increase the sentence impose. It also impacts the defendant's sentencing guidelines range via the scoring of Prior Record Variable 7 for a concurrent conviction, e.g. raising even a first-time offender's prior record level from A to at least C. MCL 777.57 (PRV 7); MCL 777.61 -777.69 (sentencing grids). This can significantly increase the sentencing guidelines range. *Id.*

The Court in *People v Doss* held that "[w]hile the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which State must establish beyond a reasonable doubt." 406 Mich 90, 99 (1979). *Doss* does not bar Mr. Davis' claim. Mr. Davis does not demand that, in order to convict him of Aggravated Domestic Assault, the People prove beyond a reasonable doubt that he lacked intent to commit great bodily harm. Rather, he asks only that this Court vindicate his right to a jury trial on the question of which *mens rea* he possessed at the time of the alleged criminal act.

III. Mr. Davis's state and federal rights to Due Process were violated by the prosecution's use of conflicting and mutually exclusive theories and the trial court's entry of conflicting and mutually exclusive judgments.

Standard of Review/Issue Preservation

This Court has authority to add "permit the reasons or grounds for appeal to be amended or for new grounds to be added" at any time. MCR 7.316(A)(3). The Court of Appeals' resolution of Mr. Davis' case on grounds other than Double Jeopardy creates additional questions. "Constitutional claims of due process violations are reviewed de novo." *People v Hill,* 282 Mich App 538, 540 (2009).

Discussion

One of the fundamental principles of our legal system is that the government's interest in criminal prosecutions is not simply to win a conviction, but rather to see that justice is done. *Berger v United States,* 295 US 78, 88 (1935). "A prosecutor has the responsibility of a minister of justice, not simply that of an advocate." *People v Jones*, 468 Mich 345, 354 (2003). As a result, the Due Process Clause of the US Constitution and the Michigan Constitution require that prosecutors act fairly and prohibits them from certain conduct. US Const, Am XIV; Const 1963, art 1, § 17; s*ee also*, *eg, Napue v Illinois*, 360 US 264, 269, 272 (1959)(due process is violated when prosecutors knowingly or recklessly uses false testimony). As the United States

Supreme Court has explained, "our system of the administration of justice suffers when any accused is treated unfairly."[7]

Some jurisdictions have recognized that it is a Due Process violation for a prosecutor to purse inherently factually contradictory theories to support the conviction of separate defendants. In *Smith v Groose,* 205 F3d 1045 (CA 8, 2000), the Eighth Circuit granted habeas relief in a murder case where the prosecutor pursued two different theories regarding the identity of the person who had killed a couple during the course of a robbery. In *Smith*, the government argued the truth of different versions in separate trials to gain convictions. In reversing the conviction of one of the men, the court held "that the use of inherently factually contradictory theories violates the principles of due process." *Smith, supra* at 1052. Similarly in *Thompson v Calderon,* 120 F3d 1045, 1058 (CA 9, 1997)(en banc)[8] the 9th Circuit analyzed the "bedrock principles" of our system of criminal justice, that the prosecution has a duty not only to convict but also to "vindicate the truth and to administer justice." As a result, "[w]hen no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Id.* at 1059. The *Thompson* court drew a parallel to *Drake*

[7] *Brady v Maryland,* 373 US 83 (1963); *see also People v Lester,* 232 Mich App 262, 276 (1998) (defendant has a due process right to a criminal prosecution that comports with prevailing norms of fundamental fairness).

[8] *Thompson* was reversed on other grounds at 523 US 538 (1998). *But see United States v Frye,* 489 F3d 201 (5th Cir 2007)(where inconsistencies immaterial to conviction court states that "a prosecutor can make inconsistent arguments at the separate trials of codefendants without violating the due process clause."); *Bradshaw v Stumpf,* 545 US 175, 190 (2005)(Thomas, J, concurring)(stating that the Supreme Court has never held that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories).

v Kemp, 762 F2d 1449 (CA 11, 1995). In *Drake*, the prosecution argued in the first case against a man named Campbell that he, Campbell, had committed the murder. In the second prosecution, the prosecution argued that Campbell was physically incapable of the murder and that Drake must have been the real killer. In this second prosecution, the prosecution relied on Campbell's testimony (which was, not incidentally, consistent with his testimony in his own case). While relief in *Drake* was granted on other grounds, concurring Judge Clark emphasized that the prosecution's advancement of inconsistent was a "fundamental and egregious" error that violated both Campbell and Drake's due process rights.[9] *Id.* at 1059 quoting *Drake, supra* at p 1479 (Clark, J concurring). Judge Clark wrote that the prosecution's use of inconsistent theories "reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth." *Id.*

The Due Process violation seems more egregious when the conflicting theories are used by the prosecutor and conflicting judgments entered by a court against a single defendant and his punishment thereby increased. This is not the same as charging a defendant under a harsher general offense statute rather than or along with a more specific offense statute where there is no conflict. See *People v Ford*, 417 Mich 66 (1982)(the prosecutor was allowed to proceed on a charg of under the general uttering and publishing statute even when on the facts presented there was a more specific charge, misuse of a credit card); *People v Hall*, 449 Mich 446 (2016)(the misdemeanor statute and felony statue regarding election forgery did not conflict and

[9] *Id.* at 1059 quoting *Drake, supra* at p 1479 (Clark, J concurring)

thus Due Process did not prohibit the state from charging the defendant with both).

(As Judge Shapiro wrote in his dissent below:

> In my view, our prior opinion erred by defining the problem as one of mutually exclusive verdicts instead of a mutually exclusive judgments. The Supreme Court reversed because verdicts cannot be mutually exclusive when the jury is not instructed on the element that creates the inconsistency. I respectfully suggest, however, that while whether or not a jury is instructed on a negative element is relevant to a claim of mutually exclusive verdicts, it is irrelevant to the question whether the court violates a defendant's due process rights by entering a judgment for two crimes that by their terms cannot exist simultaneously. The jury is not aware that the crimes are by their plain language mutually exclusive, but the court is and, in my view, must therefore decline to enter a judgment of conviction for both offenses.
>
> ***
>
> The majority notes that MCL 750.84(3) provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." I agree; a conviction for AWIGBH does not immunize a defendant against convictions of other crimes arising out of the assault. However, the question is not whether as a general matter a defendant may be convicted of other crimes arising out of the assault, but whether the judicial system may adjudge a defendant guilty of two crimes when the statutes defining them make clear that factually only one can exist at a time, i.e., either a defendant has the intent to do great bodily harm or not.
> (COA opinion on remand, Appendix B, dissent pp 1-2).

Finally, Judge Shapiro concluded by noting this Court's reasoning in its recent decision in *People v Beck*, ___ Mich ___ (2019)(No. 152934), slip op at 20, that to allow the use of acquitted conduct at sentencing "'mak[es] no sense as a matter of law or logic," and is "a 'perver[sion] of our system of justice' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*'" is equally applicable to allowing a trial court to

enter judgments against a criminal defendant for two offenses which by their terms cannot simultaneously exist. *Id.*, Appendix B, dissent pp 2.

Summary and Request for Relief

WHEREFORE, for the foregoing reasons, Joel Eusevio Davis asks that this Honorable Court grant leave to appeal, or take other appropriate action, and reverse the Court of Appeals' decision, vacate the aggravated domestic assault conviction and remand for resentencing on AWIGBH.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Jacqueline J. McCann
BY:_____

JACQUELINE J. McCANN (P58774)
MICHAEL L. MITTLESTAT (P68478)
MAYA MENLO (P82778)
Attorneys for Defendant-Appellant
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: January 7, 2020

APPENDIX A

2015711764

STATE OF MICHIGAN **CASE NO:** 8215005481

AMENDED INFORMATION
FELONY

20TH DISTRICT COURT
3RD JUDICIAL CIRCUIT

The People of the State of Michigan

vs

JOEL EUSEVIO DAVIS 82-15711764-01

Offense Information
Police Agency / Report No.
DEARBORN HTS PD 15-10162
Date of Offense
06/10/2015
Place of Offense
35650 HASS, DEARBORN HEIGHTS
Complainant or Victim
SHAWNA LYNN SHELTON
Complaining Witness
D/SGT PHIL WENGROWSKI

STATE OF MICHIGAN, COUNTY OF Wayne
In the name of the People of the State of Michigan: The Prosecuting Attorney for this county appears before the Court and informs the Court that on the date and at the location above described, the Defendant(s)

COUNT 1: DOMESTIC VIOLENCE - AGGRAVATED
did, assault Shawna Shelton, a resident or former resident of his household, or , an individual with whom he had a dating relationship, without a weapon, and did inflict serious or aggravated injury upon her, but without intending to commit murder or to inflict great bodily harm less than murder; contrary to MCL 750.81a(2). [750.81A2]
MISDEMEANOR: 1 Year and/or $1,000.00. A consecutive sentence may be imposed under MCL 750.506a if the assault was committed in a place of confinement.
SECOND OFFENSE NOTICE
Take notice that the defendant was previously convicted of assaulting or assaulting and battering his or her spouse, former spouse, an individual with whom he or she had a dating relationship, an individual with whom he or she had a child in common, or a resident or former resident of his or her household by violating MCL 750.81(2) on or about 07/03/2014, and therefore, upon conviction, will be subject to an enhanced sentence under MCL 750.81a(3) or MCL 750.81. [750.81A3]
FELONY: 5 Years and/or $5,000.00. A consecutive sentence may be imposed under MCL 750.506a if the assault was committed in a place of confinement.

COUNT 2: ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER
did make an assault upon Shawna Lynn Shelton with intent to do great bodily harm less than the crime of murder; contrary to MCL 750.84. [750.84].
FELONY: 10 Years or $5,000.00. DNA to be taken upon arrest. A consecutive sentence may be imposed under MCL 750.506a if the assault was committed in a place of confinement.

COUNT 3: MOTOR VEHICLE - UNLAWFUL DRIVING AWAY
did willfully and without authority, take possession of and drive or take away, or did assist in, or was a party to such taking possession, driving or taking away, of a motor vehicle, to-wit: an automobile belonging to another, to-wit: Shawna Lynn Shelton; contrary to MCL 750.413. [750.413]
FELONY: 5 Years; SOS to suspend driver's license

COUNT 4: LARCENY - $200.00 OR MORE BUT LESS THAN $1,000.00
did commit the offense of larceny by stealing money and cellphone, that belonged to Shawna Lynn Shelton, the value of the property stolen was $200.00 or more but less than $1,000.00; contrary to MCL 750.356(4)(a). [750.3564A]
MISDEMEANOR: 1 Year and/or $2,000.00, or 3 times the value of the property stolen, whichever is greater. To impose a fine of 3 times the value, the defendant must admit the amount, or it must be determined by the trier of fact at trial. See *Southern Union Co. v United States 567 U.S. ___; No. 11-94 (2012)*

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

and against the peace and dignity of the State of Michigan.

_____
Date

Kym Worthy
P38875
Prosecuting Attorney
By: Shelley Drain P60249
Bar Number

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL EUSEVIO DAVIS,

Defendant-Appellant.

UNPUBLISHED
November 12, 2019

No. 332081
Wayne Circuit Court
LC No. 15-005481-01-FH

ON REMAND

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM.

In *People v Davis*, 320 Mich App 484; 905 NW2d 482 (2017) (*Davis I*), we vacated defendant's convictions for aggravated domestic assault (second offense), MCL 750.81a(3), and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, after determining that the offenses were mutually exclusive. Our Supreme Court vacated that portion of *Davis I*, reasoning:

> Regardless of whether this state's jurisprudence recognizes the principle of mutually exclusive verdicts, this case does not present that issue. In this case, the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted "with intent to do great bodily harm, less than the crime of murder." See MCL 750.84(1)(a). However, with respect to aggravated domestic assault, the jury was not instructed that it must find that defendant acted without the intent to inflict great bodily harm. See MCL 750.81a(3); *People v Doss*, 406 Mich 90, 99 (1979) ("While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."). Since, with respect to the aggravated domestic assault conviction, the jury never found that defendant acted without the intent to inflict great bodily harm, a guilty verdict for that offense was not mutually exclusive to defendant's guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm.

> Thus, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate defendant's aggravated domestic assault conviction. [*People v Davis*, ___ Mich ___; ___ NW2d ___ (Docket No. 156406, entered March 22, 2019) (*Davis II*).]

On remand, the Supreme Court directed us to consider defendant's challenge to his convictions and sentences on double-jeopardy grounds, taking into consideration *People v Miller*, 498 Mich 13; 869 NW2d 204 (2015), and explicitly addressing the proper standard of review.

Based on *Miller* and the legislative history of Michigan's assault statutes, we now hold that defendant's convictions did not violate double-jeopardy principles and affirm.

I

In 2015, defendant physically assaulted his girlfriend, causing significant facial injuries. *Davis I*, 320 Mich App at 486-487. A jury convicted defendant of aggravated domestic assault (second offense), MCL 750.81a(3), and AWIGBH, MCL 750.84(1)(a). *Davis I*, 320 Mich App at 486. The trial court sentenced defendant to 1 to 5 years' imprisonment for aggravated domestic assault, and 65 months to 10 years' imprisonment for AWIGBH. In *Davis I*, 320 Mich App at 487-489, we rejected defendant's challenge to the admission of certain evidence against him. We did not address defendant's second issue as presented by him: that his convictions violated his right to be free from multiple punishments for the same offense under double-jeopardy principles. We now do so relying upon *Miller*, 498 Mich 13.

II

We first note that defendant failed to preserve this issue by raising a double-jeopardy challenge in the trial court. Our review of unpreserved constitutional issues is limited to plain error affecting defendant's substantial rights. *People v Carines*, 463 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only if the error resulted in a conviction despite the defendant's actual innocence, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *People v Ackah-Essien*, 311 Mich App 13, 30-31; 874 NW2d 172 (2015).

III

The double-jeopardy provisions of the United States and Michigan Constitutions[1] protect individuals from being twice placed in jeopardy for the same offense and "protect[] against multiple punishments for the same offense." *Miller*, 498 Mich at 17 (cleaned up).[2]

[1] US Const, Am V; Const 1963, art 1, § 15.

[2] This opinion uses the parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as

> The multiple punishments strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature and therefore acts as a restraint on the prosecutor and the Courts. The multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment under two statutes. Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. [*Id*. at 17-18 (cleaned up).]

"The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments." *Id*. at 19. Where legislative intent is not clear, Michigan courts employ the "abstract legal elements" test of *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008). *Miller*, 498 Mich at 19. Under this test, "two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Id*.

At issue in *Miller* was whether separate convictions arising from the same conduct for operating while intoxicated (OWI), MCL 257.625(1), and operating while intoxicated causing serious impairment of the body function of another person (OWI-injury), MCL 257.625(5), violated the defendant's right to be free from double jeopardy. *Miller*, 489 Mich at 15. The Supreme Court determined that the Legislature's intent with respect to these statutes could be derived without reference to the *Ream* test. MCL 257.625(1) and (5), when viewed in isolation, did not demonstrate any legislative intent regarding the authorization of cumulative punishment. *Miller*, 498 Mich at 22-23. But, the Court explained, "we do not quarantine the text when interpreting statutes. Instead, we must examine the statutory language as a whole to determine the Legislature's intent." *Id*. at 23. MCL 257.625(7)(d) provides that punishment under MCL 257.625(7) does not preclude punishment for a violation of MCL 257.625(4) or (5). *Miller*, 498 Mich at 23-24. This specific authorization permitting multiple punishments only when subsection (7) and either subsection (4) or subsection (5) are involved, means that "the Legislature did *not* intend to permit multiple punishments for OWI and OWI-injury offenses arising from the same incident"; the statute does not include a like provision permitting multiple punishments for violations of subsections (1) and (5). *Id*. at 24. "The fact that the Legislature expressly authorized multiple punishments for Subsection (5) and a subsection other than Subsection (1) demonstrates that the Legislature did not intend to permit multiple punishments for violations of Subsections (1) and (5)." *Id*. Having determined that the Legislature clearly did not intend for one to be punished under both MCL 257.625(1) and (5) for the same conduct, the Court did not need to resort to the *Ream* test to find a double-jeopardy violation. *Miller*, 498 Mich at 24-27.

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brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

IV

The reasoning of *Miller* dictates that a defendant may be convicted of both AWIGBH and aggravated domestic assault arising from the same conduct. "[T]he statutory language evinces a legislative intent with regard to the permissibility of multiple punishments" and we may not resort to *Ream*'s "abstract legal elements" test. *Id*. at 19.

MCL 750.84(1)(a) makes it is a 10-year felony to "[a]ssault[] another person with intent to do great bodily harm, less than the crime of murder." MCL 750.84(3) provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." This legislative statement leaves no room for dispute. The Legislature has made it clear that one may be punished under MCL 750.84, and also for any other violation of law arising out of the same conduct. As such, there is no double-jeopardy violation.

Defendant contends, however, that the language of MCL 750.81a and MCL 750.84(1) conflict, thereby demonstrating the Legislature's intent that one cannot be convicted of both offenses for the same conduct, despite the command of MCL 750.84(3). Defendant relies on our statement in *Davis I*, 320 Mich App at 490 (cleaned up), that the two statutes are "mutually exclusive from a legislative standpoint. One requires the defendant to act with the specific intent to do great bodily harm less than murder; the other is committed without intent to do great bodily harm less than murder." Defendant asks this Court to imply that the legislative command stated in MCL 750.84(3) does not apply when the other offense is a charge under MCL 750.81a. We cannot grant this request.

Our ultimate task is to derive our Legislature's intent. *People v Rea*, 500 Mich 422, 427; 902 NW2d 362 (2017). The most reliable evidence of our Legislature's intent is the plain language of the statute. *Id*. Every word, phrase, and clause must be given effect, and this Court must "avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. at 427-428 (cleaned up). MCL 750.84(3) plainly and unambiguously provides that defendant's AWIGBH conviction does not preclude a conviction of aggravated domestic assault. The only way to reach the result advocated by defendant is to ignore MCL 750.84(3), or to at least rewrite the language, "any other violation of law" to except a conviction of aggravated domestic assault. We may not rewrite the statute in this manner. *McDonald v Farm Bureau Ins Co*, 481 Mich 191, 199; 747 NW2d 811 (2008).

Moreover, the history of the relevant statutes reveals that our Legislature meant what it said in MCL 750.84(3), even when the crimes at issue are aggravated domestic assault and AWIGBH. By way of 1931 PA 328, our Legislature codified 10 forms of assault. MCL 750.81 made all assaults not otherwise defined a misdemeanor.[3] Nine remaining forms of assault were

[3] "Any person who shall be convicted of an assault or an assault and battery where no other punishment is prescribed shall be guilty of a misdemeanor." MCL 750.81, as enacted by 1931 PA 328.

then enumerated, including AWIGBH, which was found in MCL 750.84. As enacted by 1931 PA 328, MCL 750.84 stated, in its entirety, "Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars." Eight other forms of assault were listed, none of which addressed domestic assaults.

Through 1939 PA 237, our Legislature enacted MCL 750.81a. As originally enacted, the statute deemed an assault causing serious or aggravated injury as a misdemeanor:

> Any person who shall assault another without any weapon and inflict serious or aggravated injury upon the person of another without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail or the state prison for a period of not more than 1 year, or fine of $500.00, or both. [MCL 750.81a, as enacted by 1939 PA 237.]

The Legislature's intent in first enacting MCL 750.81a was to define an additional form of assault. This form of assault would exist where one, without a weapon, caused serious injury, but did so without intending to kill or inflict great bodily harm on the victim. It was originally a "gap-filler." It appears that when MCL 750.81a was first enacted, the Legislature did not envision a situation where one could be guilty of both AWIGBH and the type of assault delineated by MCL 750.81a. Rather, MCL 750.81a and MCL 750.84 described different types of assaults.

Our Legislature amended MCL 750.81a through 1994 PA 65. The form of assault generally described by the statute remained, although it was reworded for clarity, and the amount of the potential fine was increased. Significant to the present case, our Legislature also added two subsections addressing domestic assaults:

> (2) Except as provided in subsection (3), an individual who assaults his or her spouse or former spouse, an individual with whom he or she has a child in common, or a resident or former resident of his or her household, without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
>
> (3) An individual who assaults his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, in violation of subsection (2), and who has 1 or more previous convictions for assaulting and battering his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, in violation of this section or [MCL 750.81, MCL 750.82, MCL 750.83, MCL 750.84, or MCL 750.86] or a local ordinance substantially corresponding to [MCL 750.81], is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both. [MCL 750.81a(2) and (3), as enacted by 1994 PA 65.]

1994 PA 65 was tie-barred to 1994 PA 64. 1994 PA 64 clarified the language of MCL 750.81 and added domestic assault provisions. Those provisions stated that domestic assaults that did not cause serious or aggravated injuries would be punishable as misdemeanors on the first two occasions, and as a felony on the third. MCL 750.81(1)-(4), as enacted by 1994 PA 64. 1994 PA 64 and 1994 PA 65 essentially provided sentence enhancements for assaults committed in the context of a domestic relationship. See *People v Wilson*, 265 Mich App 386, 392-394; 695 NW2d 351 (2005). But because the underlying forms of assault were those criminalized by MCL 750.81 and MCL 750.81a, it is possible that the Legislature did not foresee that a defendant could be convicted of both AWIGBH and domestic assault under MCL 750.81 or aggravated domestic assault under MCL 750.81a. In that regard, it is important to note that MCL 750.84 was not amended at the time these domestic assault provisions were created.

The next set of relevant legislative amendments—2012 PA 366 and 2012 PA 367—took effect on April 1, 2013. 2012 PA 366 amended MCL 750.81 and MCL 750.81a, increasing the penalties for those convicted of multiple domestic assaults. 2012 PA 367 substantially rewrote MCL 750.84 as follows:

> (1) A person who does either of the following is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both:
>
> (a) Assaults another person with intent to do great bodily harm, less than the crime of murder.
>
> (b) Assaults another person by strangulation or suffocation.
>
> * * *
>
> (3) *This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section*. [Emphasis added.]

This history makes clear that when our Legislature enacted 2012 PA 366 and 2012 PA 367, its intent was to increase the penalties for domestic assaults and to clarify that one who commits AWIGBH can also be prosecuted under the domestic assault statutes. "The Legislature is presumed to know of and legislate in harmony with existing laws." *People v Pace*, 311 Mich App 1, 9; 874 NW2d 164 (2015) (cleaned up). That the Legislature was aware of the domestic assault statutes when it amended MCL 750.84—and specifically, when it added MCL 750.84(3)—is all the more clear when one knows that the domestic assault statutes were amended effective the same day the Legislature amended MCL 750.84. Had the Legislature intended that an AWIGBH conviction would preclude a conviction under MCL 750.81a, it could have said so. Not doing so appears to be a conscious choice. Because the Legislature's intent

was to permit punishment for both AWIGBH and aggravated domestic assault arising out of the same conduct, there can be no double-jeopardy violation.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL EUSEVIO DAVIS,

Defendant-Appellant.

UNPUBLISHED
November 12, 2019

No. 332081
Wayne Circuit Court
LC No. 15-005481-01-FH

ON REMAND

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent. In our initial opinion, we held that the crimes of aggravated domestic assault and assault with intent to do great bodily harm (AWIGBH) are mutually exclusive with one another considering the statutory language defining each crime. *People v Davis*, 320 Mich App 484, 494-496; 905 NW2d 482 (2017). The Supreme Court reversed, finding that because the jury was not instructed on the negative element for aggravated domestic assault, i.e., "that defendant acted *without* the intent to inflict great bodily harm," the verdicts were not mutually exclusive. *People v Davis*, 503 Mich 984 (2019). In other words, because the jury was not instructed on the inconsistent nature of the two offenses, it did not render inconsistent findings.

In my view, our prior opinion erred by defining the problem as one of mutually exclusive *verdicts* instead of a mutually exclusive *judgments*. The Supreme Court reversed because verdicts cannot be mutually exclusive when the jury is not instructed on the element that creates the inconsistency. I respectfully suggest, however, that while whether or not a jury is instructed on a negative element is relevant to a claim of mutually exclusive verdicts, it is irrelevant to the question whether the court violates a defendant's due process rights by entering a judgment for two crimes that by their terms cannot exist simultaneously. The jury is not aware that the crimes are by their plain language mutually exclusive, but the court is and, in my view, must therefore decline to enter a judgment of conviction for both offenses. That the offenses are mutually exclusive is apparent on the face of the statutes. AWIGBH occurs when the defendant either

assaults a person by strangulation or suffocation (neither of which apply here), or when the defendant "[a]ssaults another person *with intent to do great bodily harm* . . . ." MCL 750.84(1)(a) (emphasis added). In contrast, a defendant commits aggravated domestic assault when he inflicts serious or aggravated injury "*without intending to* . . . *inflict great bodily harm* . . . ." MCL 750.81a(2) (emphasis added).

The majority notes that MCL 750.84(3) provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." I agree; a conviction for AWIGBH does not immunize a defendant against convictions of other crimes arising out of the assault. However, the question is not whether as a general matter a defendant may be convicted of other crimes arising out of the assault, but whether the judicial system may adjudge a defendant guilty of two crimes when the statutes defining them make clear that factually only one can exist at a time, i.e., either a defendant has the intent to do great bodily harm or not.[1]

In a recent case, the Supreme Court acknowledged that relying on acquitted conduct to increase a defendant's sentence " 'mak[es] no sense as a matter of law or logic,' " and is "a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*.' " *People v Beck*, ___ Mich ___, ___; ___ NW2d ___ (2019) (Docket No. 152934); slip op at 20 (citations omitted; first alteration added). I would conclude that this characterization applies equally to a court's entry of judgment of guilt for two offenses that by their terms cannot exist simultaneously.

/s/ Douglas B. Shapiro

[1] The majority undertakes a thoughtful analysis of legislative intent reviewing the interplay of various amendments. However, none of the amendments speaks to the specific contradictory language in the offenses before us.